

**United States Department of Labor
Employees' Compensation Appeals Board**

R.C., Appellant

and

**U.S. POSTAL SERVICE, CUSTOMER
CARE CENTER, Detroit, MI, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-0097
Issued: August 21, 2015**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument July 22, 2015

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 12, 2014 appellant timely appealed a March 31, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision of January 7, 2013 to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f)(2014). One hundred and eighty days from March 31, 2014, the date of OWCP's last decision, was Saturday, September 27, 2014. The next business day was Monday, September 29, 2014. Because using October 17, 2014, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service (USPS) postmark is September 12, 2014, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. §§ 8101-8193 (2006).

³ The case record includes evidence received after OWCP issued its March 31, 2014 decision. Appellant also submitted additional evidence directly to the Board on appeal. However, the Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely and he failed to present clear evidence of error.

FACTUAL HISTORY

Appellant, a 41-year-old mail processing clerk, has an accepted occupational disease claim for aggravation of lumbar radiculopathy at L5, which arose on or about June 13, 2011 (xxxxxx086). He previously injured his lower back in a December 14, 2001 work-related fall, which OWCP accepted for back contusion, lumbar radiculopathy, L4-5 disc protrusion, and L5-S1 disc herniation (xxxxxx459).⁴ At the time of appellant's June 2011 injury, he was working in a limited-duty capacity as a call center agent. The work restrictions were due to his December 2001 employment injury.⁵ OWCP paid wage-loss compensation for temporary total disability effective June 15, 2011, and placed appellant on the periodic compensation rolls.

Effective August 9, 2012, OWCP terminated appellant's wage-loss compensation based on the June 1, 2012 report of Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon and OWCP referral physician. Dr. Obianwu found no evidence of an ongoing lumbar contusion, lumbar radiculopathy, or L4-5 disc herniation. He also reported that there were no residuals of the June 2011 aggravation of lumbar radiculopathy at the L5 level. The only unresolved condition was appellant's L5-S1 disc herniation. Although appellant was unable to return to his date-of-injury position, Dr. Obianwu found that the residuals of the L5-S1 disc herniation did not preclude him from resuming work as a call center agent. Consequently, OWCP terminated wage-loss compensation. However, appellant remained eligible for medical benefits. On January 7, 2013 the Branch of Hearings and Review affirmed OWCP's August 9, 2012 decision.

Following the hearing representative's decision, OWCP received additional medical evidence, which included treatment records and reports from Dr. Thomas C. Schuler, a Board-certified orthopedic surgeon, who initially examined appellant on January 8, 2013 and diagnosed, lumbar radiculitis. It also received a January 25, 2013 electromyography and nerve conduction study (EMG/NCV) that evinced left-sided radiculopathy at L5-S1. Additionally, Dr. Warren D. Yu, a Board-certified orthopedic surgeon, examined appellant on March 1, 2013, and diagnosed work-related L5-S1 left-sided radiculopathy. He recommended a microdiscectomy at L5-S1. Appellant also submitted additional follow-up treatment records and reports from Dr. Schuler dated April 9, May 16 and 30, and October 8, 2013.

In correspondence dated December 23, 2013, received on January 21, 2014 appellant requested reconsideration. He challenged OWCP's reliance on Dr. Obianwu's June 1, 2012 opinion, and highlighted Dr. Schuler's treatment records covering January through

⁴ The case records for appellant's two work-related lumbar injuries have been combined, and the December 2001 traumatic injury claim was designated the master file (xxxxxx459).

⁵ Appellant's restrictions included sedentary work that did not involve repetitive bending or lifting greater than 20 pounds. He was also limited to no more than two hours per day of lifting and bending/stooping. Upon resuming work on June 13, 2011 appellant was expected to participate in a five-day call center agent training program. His return to work was short-lived, lasting only two days.

October 2013. Appellant also noted the latest EMG/NCV study results that showed left-sided L5-S1 radiculopathy. OWCP subsequently received February 2014 treatment notes from Dr. Schuler, which included a recent x-ray report. When he last saw appellant on February 27, 2014, Dr. Schuler noted that OWCP approved the requested surgery, but a new magnetic resonance imaging scan was necessary before proceeding with surgery.

In a decision dated March 31, 2014, OWCP found that appellant's request for reconsideration was untimely. It also found that he had not presented clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁹

ANALYSIS

The record indicates that OWCP received appellant's request for reconsideration on January 21, 2014, which is more than one year after the January 7, 2013 merit decision terminating wage-loss compensation. As such, the request for reconsideration from that decision

⁶ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁹ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit, and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

was untimely.¹⁰ At oral argument, appellant represented that USPS tracking information revealed that he mailed the request on January 2, 2014, and the postal service delivered it to a Washington, DC address on January 6, 2014. However, the tracking information was not part of the record at the time OWCP issued its March 31, 2014 decision and the Board is precluded from considering this information for the first time on appeal.¹¹ Consequently, there is no evidence of record that contradicts the iFECS receipt date of January 21, 2014.¹² Because appellant's request was untimely, he must demonstrate clear evidence of error on the part of OWCP in terminating wage-loss compensation.¹³

The senior claims examiner noted in her March 31, 2014 decision that she considered appellant's request under 20 C.F.R. § 10.607(b) to determine whether he presented clear evidence that OWCP's last merit decision was incorrect. After citing Board precedent regarding the type of evidence necessary to establish clear evidence of error, she found that he "did not present clear evidence of error." However, the decision did not identify the issue on reconsideration, nor did it discuss any of the evidence OWCP received since its last merit decision dated January 7, 2013.

An OWCP decision "shall contain findings of fact and a statement of reasons."¹⁴ The March 31, 2014 decision does not identify OWCP's reason(s) for finding that appellant had not demonstrated clear evidence of error. The "letter decision" format used by the claims examiner, while appropriate under the circumstances, should nonetheless include "a brief evaluation of the evidence submitted..."¹⁵ OWCP must properly review all the evidence to determine if the clear evidence of error standard has been met.¹⁶ Because OWCP's March 31, 2014 decision does not fully comply with 20 C.F.R. § 10.126, the decision will be set aside in part. Accordingly, the case shall be remanded for a proper review of the evidence and issuance of an appropriate final decision.

¹⁰ See *supra* note 8. Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, *supra* note 9 at, Chapter 2.1602.4b. Federal (FECA) Procedure Manual, *supra* note 8 at, Chapter 2.1602.4b.

¹¹ See *supra* note 3.

¹² See *A.M.*, Docket No. 14-1351 (issued October 20, 2014) (the Board noted that the document itself contained a stamp that purported to offer an earlier date of receipt than noted in iFECS).

¹³ 20 C.F.R. § 10.607(b). In this instance, the apparent delay in receipt was likely due to appellant having mailed his request to the wrong Department of Labor (DOL) address. The instructions that accompanied the hearing representative's January 7, 2013 decision clearly advised appellant that the request for reconsideration and any new evidence should be sent to a DOL/OWCP P.O. Box (8300) in London, KY. However, appellant addressed his December 23, 2013 request to "800 N. Capitol Street, N.W., Room 800[,] Washington, DC 20211."

¹⁴ 20 C.F.R. § 10.126.

¹⁵ Federal (FECA) Procedure Manual, *supra* note 8 at, Chapter 2.1602.5b.

¹⁶ *Supra* note 12.

CONCLUSION

OWCP properly determined that appellant's request for reconsideration was untimely pursuant to 20 C.F.R. § 10.607(a). As to whether appellant presented clear evidence of error, that aspect of the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: August 21, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board